

NO. 1589

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR ASHBY,

vs.

THE CITY OF JUNEAU,
a Municipal Corpora-
tion, Etc.

PETITION

FOR APPEARANCE AS AMICUS
CURIAE AND AUTHORITIES

E. M. BARNES,

As Amicus Curiae.

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I.

And now comes E. M. Barnes and respectfully petitions to be allowed to appear in this cause Amicus Curiae, for the following reasons:

Petitioner is attorney for the defendants in Cause No. 665 A in the District Court for the District of Alaska, Division No. 1, at Juneau, wherein the City of Juneau, the above named, is plaintiff and John Johnston and Elizabeth Decker are defendants, in which suit substantially the question involved in this suit is involved in that suit, to-wit: the condemnation of tide lands below high water tide, on the shore of Gastineau Channel, an arm of the Pacific Ocean, for the purposes of a street for said City of Juneau.

II.

Petitioner is informed and believes, and so states the fact to be, that there is collusion between the Appellant and Respondent in this cause, which will prevent this cause being heard on its merits, and if this cause be not heard on its merits, an appeal may be necessary in said Cause No. 665 A, and if this cause be heard on its merits no appeal will be necessary in said Cause No. 665 A, thereby saving to my clients a large sum of money, saving this Honorable Court the hearing of two appeals when one only is necessary, and giving to the people of far off Alaska, an adjudication on a matter of great moment to many of them.

And your petitioner will ever pray.

E. M. BARNES,
As Amicus Curiae.

ARGUMENT.

The point I desire to bring to this Honorable Court's attention is that the complaint does not state facts sufficient to constitute a cause of action. It seeks to condemn the shores of Gastineau Channel, below the line of ordinary high tide for the purposes of a street.

Referring to plaintiff's complaint, Allegation IV. thereof, "That the defendant, Oscar Ashby, is in possession of and claims possessory right to a certain parcel of land situate on the shores of Gastineau Channel, a navigable arm of the Pacific Ocean, and below the line of ordinary high tide."

And this is the land sought to be condemned for a street.

This suit is brought under Chapter 22, page 395, Carter's Alaska Code.

The only kind of property that can be condemned for such purposes is "all real property belonging to any person."

Section 206, page 396, Carter's Alaska Code.

Tide land does not belong to any person.

Hampton vs. Columbia Canning Co., from Alaska, decided by this Honorable Court, but not so far in book form, as far as petitioner is informed.

The complaint does not even allege that the land sought to be condemned belongs to any person.

"The primary meaning, and also the common and ordinary meaning of the word 'belong' is to be the 'property of.'"

Gammon vs. Gammon Theological Seminary, 38 N. E. 890, 891; 153 Ill. 41.

State vs. Fox, 20 Am. State Rep. 425; 80 Iowa, 312, 313; 45 N. W. 874.

"One of the approved definitions of the word 'belong' is to be the property of, and 'belonging' is the property of."

Commonwealth vs. Hamilton, 81 Mass. (15 Gray), 480-2.

That Osear Ashby claims a possessory right is far different from alleging the property belonged to him.

Again if the complaint did so allege the city has no right to take tide lands for the purposes of a street.

"The public officers of a town have no right to lay out a town way between high water and the channel of a navigable river, or appropriate the shore or flats to the use of the inhabitants of the town in the form of a way or road."

Richardson vs. City of Boston, 60 U. S. 15 Law Ed. 642.

"By the common law all arms of the sea where the tide ebbs and flows are the property of the sovereign."

Hale de Jur. Mar. pt. I., c. 1, 2, 3.

“An order of the court of sessions laying out a road across an inlet of the sea, capable of useful navigation is void, such inlet being public property.”

Commonwealth vs. Charlestown, 1 Pick. 180.

The city cannot build a street over tide lands.

Charlestown vs. Commissioners of Middlesex, 3 Met. 202.

Wonson vs. Wonson, 14 Allen 82.

Commonwealth vs. Alger, 7 Allen 53.

Boston vs. Richardson, 105 Mass. 351.

Attorney General vs. Woods, 108 Mass. 436.

U. S. vs. New Bedford I. Wood & M., 407, 415.

For these reasons it seems to me the complaint does not state facts sufficient to constitute a cause of action.

Respectfully submitted,

E. M. BARNES,
As Amicus Curiae.